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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH F. WANSONG, Petitioner,

vs.

EDWARD F. HENNESSEY, Chief Justice,
Supreme Judicial Court of Massachusetts
and ELIZABETH WANSONG, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

Earl M. Weissman
Counsel of Record
5 Briscoe Street
Beverly, Massachusetts 01915
(617) 922 4025

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Questions Presented For Review

1. Whether the sanction of striking of a husband's Complaint for Divorce for invoking, during a pre-trial deposition, the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Constitution, is too severe a penalty and denial of due process for invoking the right against self-incrimination.
2. Whether the sanction of prohibiting a husband from introducing testimonial or documentary evidence on certain important aspects of his financial and other contributions to the marriage is too severe a penalty and a deprivation of due process, for his invocation during a pre-trial deposition, of the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Constitution.

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28 U.S.C 2101 (c)

Fifth Amendment - U.S. Constitution

Article XII - Mass. Constitution

Chapter 208 Section 45, Maws. General Laws

NO.

SUPREME COURT OF THE UNITED STATES

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JOSEPH F. WANSONG,

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EDWARD F. HENNESSEY, Chief Justice, Supreme Judicial Court of the Commonwealth of Massachusetts and ELIZABETH WANSONG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME AND JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Petitioner, Joseph F. Wansong, petitions for a Writ of Certiorari to review the decision and judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this case on June 11, 1985.

CITATION TO OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 395 Massachusetts 154, 478 North Eastern Reporter, Second Series, 1270. The said decision of the Supreme Judicial Court of the Commonwealth of Massachusetts is reproduced in appendix A. hereof.

A copy of the Essex County Family and Probate Court decision (Trial Court) dated October 17, 1983 is reproduced in appendix B hereof.

A copy of the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated June 11, 1985, is reproduced in appendix C hereof.

JURISDICTION

This Petition for Writ of Certiorari was filed within ninety days of the date of the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts, in accordance with the provisions of 28 U.S.C. Section 2101 (c).

The case was decided on June 11, 1985, by the Supreme Judicial Court of the Commonwealth of Massachusetts.

CONSTITUTIONAL PROVISIONS INVOLVED

The terms of the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Constitution are set forth in full in appendix D hereof.

STATEMENT OF THE CASE

The petitioner, Joseph F. Wansong, filed a Complaint For Divorce against his wife, Elizabeth A. Wansong, on March 2, 1983 in the Essex County Probate and Family Court at Salem, Massachusetts.

Thereafter, on April 4, 1983 a notice of deposition was sent to the petitioner for a deposition to be held June 13, 1983.

At the deposition the petitioner refused to answer certain questions, invoking his rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Constitution.

The Trial Court on June 23, 1983 ordered the petitioner to answer the questions posed to him at the deposition.

The parties entered into a stipulation to the effect that if another deposition were to take place the petitioner would again refuse to answer the questions.

The questions related to whether or not the petitioner was having an adulterous relationship.

The Trial Court on October 13, 1983, inter alia entered the following findings based on the petitioners failure to answer questions:

1. Ordered that the petitioner's Complaint For Divorce be dismissed.
2. Struck the petitioner's financial statement (which showed his income, assets and expenses).
3. Prohibited the petitioner from introducing evidence, documentary or testimonial, relating to issues of his financial and other contributions to

the marriage, and his conduct during the marriage. This would relate to the respondent wife's Complaint For Divorce which was filed April 27, 1983 and which is still pending.

The petitioner timely claimed appeals from the various rulings. The Trial Court agreed to reserve and report the correctness of his decisions to the Appeals Court of the Commonwealth of Massachusetts.

The Supreme Judicial Court of Massachusetts, sua sponte, had the cases transferred to its own calendar for argument. The cases were argued on March 8, 1985, and a decision was rendered June 11, 1985.

The decision of the Supreme Judicial Court upheld the ruling of the trial judge, in his discretion, and remanded the cases to the Trial Court for further proceedings.

The issues of the right to invoke the federal and state privilege against self-incrimination were raised at the deposit-

ion itself, at the trial level by briefs of the parties to the Trial Court prior to the said rulings of October 17, 1983.

The Trial Court in its decision, a copy of which is set forth in appendix B hereof shows that the federal issue was raised by the parties and considered by the Trial Court in its decision.

The federal issue of what sanctions should be assessed against a person who invokes his rights under the Federal and Massachusetts Constitutions is discussed in the Supreme Judicial Court and Trial Court decisions.

The Supreme Judicial Court decision, on Page 5A hereof states:

"A litigant may not be subjected to a penalty such as the imposition of any sanction which makes assertion of the Fifth Amendment privilege costly. Spevack v. Klein 385 U.S. 511, 515 (1967)."

The Trial Court's decision (appendix B)

on Page 6B hereof states

"The plaintiff submits that his right to refuse to incriminate himself is justified by the holdings of the Supreme Court in Spevack v. Klein and Garrity v. New Jersey 385 U.S. 493, 1967."

REASONS FOR THE ALLOWANCE OF THE WRIT

Adultery in the Commonwealth of Massachusetts is a felony punishable by imprisonment in the state prison. The Supreme Judicial Court of Massachusetts has recently held the adultery statute to be constitutional and sustained a conviction. Commonwealth vs. Stowell 389 Massachusetts 171 (1983). A judge of a court granting a divorce for a cause constituting a crime may report the evidence to the District Attorney for his consideration. General Laws Chapter 208, Section 45 (appendix E).

The invocation of the privileges against self-incrimination was appropriate. The penalty against the petitioner for said invocation approved by the Supreme Judicial Court is draconian.

The written decision of the Supreme Judicial Court of Massachusetts regarding severity of the penalties for invocation of the Fifth Amendment conflicts with the decisions of the United States Supreme Court in Garrity v. New Jersey, 385 U.S. 493, 87 Supreme Court 616, 17 Lawyers Edition, Second Series 562 (1967) and Spevack v. Klein 385 U.S. 511, 87 Supreme Court 625, 17 Lawyers Edition, Second Series 574 (1967), and Gardiner v. Broderick 372 U.S. 273, 88 Supreme Court 1913, 20 Lawyers Edition, Second Series 1082 (1968), Wehling v. Columbia Broadcasting System, 608 Federal Reporter, Second Series 1084, Fifth Circuit, (1979).

The decision of Mahne v. Mahne, 66 New Jersey 53, 328 Atlantic Reporter, Second Series 225, (1974) decided by the highest Court of the State of New Jersey, Minor v. Minor 240 Southern Reporter Second Series 301 (1970) decided by the highest

Court of the State of Florida, and other cases set forth on pages 7B and 8B of Appendix B hereof and also in conflict with Spevack, Wehling, Garrity and Gardiner, supra.

It should therefore be decided whether the holding of the United States Supreme Court in Spevack, Garrity and Gardiner, should control the sanctions to be applied to a person who invokes the Fifth Amendment, or should the decisions of the State Courts control.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Earl M. Weissman
Counsel of Record
5 Briscoe Street
Beverly, Massachusetts
01915
(617) 922 4025

October 1, 1985

APPENDIX A

JOSEPH F. WANSONG vs. ELIZABETH A. WANSONG (and a companion case 1).

Essex. March 5, 1985 - June 11, 1985.

Present: Hennessey, C.J., Wilkins, Abrams, Nolan, & Lynch, JJ.

Practice, Civil, Discovery, Constitutional Law, Self-incrimination. Divorce and Separation, Discovery, Sanctions.

Complaints for divorce filed in the Essex Division of the Probate and Family Court Department on March 2 and April 22, 1983.

Interlocutory orders were reported to the Appeals Court by Haskell C. Freedman, J. The Supreme Judicial Court transferred the case on its own initiative.

Earl M. Weissman for the plaintiff.

Jacob M. Atwood (David E. Cherny with him) for the defendant.

NOLAN, J. Pursuant to G. L. c. 215, S 13 (1984 ed.), a Probate and Family Court judge reserved and reported the propriety of certain interlocutory orders which:

---

[1]Elizabeth A. Wansong vs. Joseph F. Wansong

1. denied the plaintiff's motion for a protective order;
2. dismissed the complaint for divorce of the plaintiff, Joseph F. Wansong[2]
3. prohibiting the plaintiff personally from introducing documentary or testimonial evidence relating to an award of support, division of marital assets, or the custody of the minor child of the marriage; and
4. struck the financial statement filed by the plaintiff and prohibited him from testifying regarding his financial circumstances, conduct of the parties during the marriage, his station, amount and sources of his income, his employability and his estate. Their reservation and report presents the

---

[2] Joseph F. Wansong initially filed a complaint for divorce. Elizabeth A. Wansong filed a cross-complaint for divorce. For the sake of clarity, Joseph F. Wansong is referred to as the plaintiff in this opinion. Elizabeth A. Wansong is referred to as the defendant.

question whether discovery sanctions may be imposed against self-incrimination pursuant to the Fifth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of Massachusetts.

The plaintiff filed a complaint for divorce alleging that "an irretrievable breakdown of the marriage...occurred due to loss of love and affection and lack of communication." The defendant filed a cross-complaint for divorce alleging that the plaintiff "was guilty of cruel and abusive treatment towards (the defendant)." On June 13, 1983, the defendant took the deposition of the plaintiff. During the deposition, defendant's counsel questioned the plaintiff regarding his relationship to and financial arrangements with a woman who was not a party to the divorce actions. On advice of counsel, the

plaintiff invoked his privilege not to incriminate himself. The defendant suspended the deposition upon the plaintiff's invocation of his privilege under the United States and Massachusetts Constitutions.

On June 20, 1983, the defendant filed motions to compel answers at the deposition and for sanctions, to dismiss the plaintiff's complaint for divorce, to prohibit the plaintiff's testimony or introduction of evidence at trial and to strike the plaintiff's financial statement and testimony. The judge ruled on the motion to compel answers and for sanctions and ordered the plaintiff "to resume his Deposition and to respond to questions which he previously refused to answer and other such questions that may be posed relating to those issues." Subsequent to this order, the parties determined that the plaintiff would continue to assert his privilege against

self-incrimination. To avoid the expense of further depositions, the plaintiff asserted and the parties stipulated "that is his deposition is resumed and the questions previously posed to him ... were asked of him he would again refuse to answer those questions based upon his Fifth Amendment right under the United States Constitution and his other rights under Article XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts."

As a result of this stipulation, the judge determined that it was appropriate to rule on the plaintiff's motion for a protective order and the defendant's remaining motions. The judge denied the plaintiff's motion. To the extent that the defendant's motions concerned limiting the plaintiff's right to present evidence at trial, the judge limited his order to the plaintiff "individually, and

not against any witnesses he may offer." The judge also dismissed the plaintiff's complaint for divorce.

1. Motion for a protective order. The plaintiff asserts that it was error for the judge to deny the motion for a protective order which sought to prohibit the defendant from resuming the taking of the plaintiff's deposition. The plaintiff argues that further discovery would not produce any additional, meaningful information and such discovery was sought to harass him. He submits, therefore, that denial of his motion for a protective order was error.

In determining whether a protective order should issue, a judge must assess the competing interests of preventing "annoyance, embarrassment, oppression, or undue burden or expense," Mass. R. Dom. Rel. p. 26 (c) (1985), and considerations of an efficient and just resolution of the action. See Matter of Roche, 381 Mass.

624, 637 (1980). "In making this assessment (a judge is) entitled to a broad measure of discretion." Id. at 638. "(O)n appeal our task is again simply to review whether that discretion has been abused." Merles v. Lerner, 391 Mass. 221, 226 (1984). In the instant case, the plaintiff continually refused to answer questions related to his financial condition and conduct as affected by an allegedly adulterous relationship. The judge properly weighted the plaintiff's concerns in asserting his privilege against self-incrimination against the need for further discovery. See part 2 infra. The judge did not abuse his discretion in denying the plaintiff's motion for a protective order.

2. Privilege against self-incrimination as related to discovery sanctions. The plaintiff argues that by imposing discovery sanctions the judge erroneously penalized the plaintiff in the exercise of his right not to incriminate himself. A litigant

may not be subjected to a penalty such as "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" Spevack v. Klein, 385 U.S. 512, 515, (1967). "Yet not every undesirable consequence which may follow from the exercise of the privilege against self-incrimination can be characterized as a penalty." Flint v. Mullen, 499 F.2d 100, 104 (1st Cir. 1974). "In a civil action, a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on the grounds of self-incrimination." Labor Relations Comm'n v. Fall River Educators' Ass'n, 382 Mass. 465, 471 (1981). See Kay v. Newhall, 356 Mass. 300, 305 (1969) (counsel may comment during closing argument on a civil defendant's invocation of the privilege against self-incrimination). See also Note, Toward a Rational Treatment of Plaintiffs Who Invoke the Privilege Against Self-Incrimination During Discovery, 66 Iowa L. Rev.

575, 579, 580 n. 41 (1981) (Note).

The Appeals Court recently stated that, in examining the effect a litigant's claim of privilege should have on a civil action, "(t)he judge's task is to balance any prejudice to the other civil litigants which might result. . . against the potential harm to the party claiming the privilege if he is compelled to choose between defending the civil actions and protecting himself from criminal prosecution." United States Trust Co. of New York v. Herriott, 10 Mass. App. Ct. 313, 317 (1980), citing Arthurs v. Stern, 560 F.2d 477, 478-480 (1st Cir. 1977), cert. denied, 434 cert. denied, 434 U.S. 1034 (1978). We view this method as the preferable approach to take when examining the effect of a plaintiff's invocation of the privilege against self-incrimination. See Black Panther Party v. Smith, 661 F.2d 1243, 1272 (D.C. Cir. 1981) See also Note, supra at 594-602. Cf.

Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1088 (5th Cir. 1979). We agree that such a balancing is the proper method to be used in determining whether discovery sanctions should be imposed on a plaintiff who claims this privilege in a civil action. In the instant case, the judge implicitly balanced the prejudice to the plaintiff, against the prejudice to the defendant. The judge also considered the need for the particular information sought in order to make a "fair determination" in this action. See Note, supra, at 598. Furthermore, the judge limited the effect of the order to the plaintiff individually. Other sources of evidence are still available to the plaintiff. The judge did not impose a sanction that abrogated "the Traditional policy against default judgments in domestic relations cases." Imprescia v. Imprescia, 392 Mass. 101, 104 (1984). Rather, after balancing the competing interests, the judge imposed sanctions

explicitly provided for in Mass. R. Dom. Rel. P. 37 (b) (2) (1985). We conclude that the judge did not abuse his discretion by dismissing the plaintiff's complaint for divorce and by imposing other discovery sanctions against the plaintiff. Cf. Arthurs v. Stern, 560 F.2d 477, 479-480 (1st Cir. 1977) (based on a balancing test, the denial of a motion to stay a civil action to allow a party to invoke a privilege against self-incrimination is reviewed "simply for abuse of discretion").

For the reasons set forth above, the judge properly entered the interlocutory orders presently before this court on reservation and report. We remand this action to the Probate and Family Court for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

1 B

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

PROBATE AND FAMILY COURT DEPARTMENT

ESSEX DIVISION NO. 70727

JOSEPH F. WANSONG

Plaintiff

vs.

ELIZABETH A. WANSONG

Defendant

COMPLAINT FOR DIVORCE

MEMORANDUM AND ORDER

ON DEFENDANT'S MOTIONS

A) TO DISMISS PLAINTIFF'S COMPLAINT FOR DIVORCE

(Pleading 30)

B) TO PROHIBIT JOSEPH F. WANSONG'S TESTIMONY OR INTRODUCTION OF EVIDENCE AT TRIAL

(Pleading 31)

C) TO STRIKE FINANCIAL STATEMENT AND TESTIMONY OF JOSEPH F. WANSONG (Pleading 32)

AND

ON PLAINTIFF'S MOTION

D) FOR PROTECTIVE ORDER (Pleading 29)

1. The Stipulation of Facts of the parties filed in this Court on September 21, 1983 is adopted by the Court and is to be considered an integral part of this Memorandum and order.
2. I accept the inclusion of the Stipulation of Facts into action 71101 (cross action for divorce by Elizabeth A. Wansong v. Joseph F. Wansong) even though:
   a) The Stipulation could be entered on both dockets (70727 and 71101) but there is no extra copy to be filed with the papers in action 71101).
   b) This Court does not approve of a single pleading with captions of two cases (albeit cross actions) being filed. Separately although identical, pleadings should be filed.
   c) This Memorandum and Order relates

to action 70727 but insofar as material shall be deemed to apply to Joseph F. Wansong as defendant in action 71101.

3. As stated in paragraph 5 of the Stipulation on June 23, 1983 I allowed prayer one of Elizabeth A. Wansong's Motion To Compel Answers At Deposition And For Sanctions (pleading 33) and entered an order on that date as follows:

"Joseph F. Wansong, plaintiff, is ordered to resume his deposition and to respond to questions which he previously refused to answer and other such questions that may be posed relating to those issues." (pleading 34)

4. At the hearing on September 21, 1983, the plaintiff, Joseph F. Wansong, challenged the sufficiency of the notice given him with respect to pleading 33 (Elizabeth A. Wansong's

Motion To Compel Answers At Deposition And For Sanctions). The facts of service are that a copy of pleading 33 was hand delivered to Mr. Wansong's counsel at his office on Monday, June 20, 1983 (received by Earl M. Weissman, counsel in the late afternoon) with notice given that the Motion had been assigned for hearing at Lawrence for Thursday, June 23, 1983 at 10:00 a.m.

5. Plaintiff's counsel submits that the notice was insufficient for the reason that three days had not elapsed from the time he received notice in the late afternoon of Monday, June 20, 1983 to the time of hearing on Thursday morning June 23, 1983 at 10:00 a.m. citing Mass. R. Dom. Rel. 6(a) and (c). Accordingly he did not appear at the hearing on June 23, 1983.

6. I rule that the notice given was sufficient. The law takes no account of fractions of a day. Callahan v. John Hancock Life Insurance Company, 331 Mass. 552, 553, (1954). And three days had elapsed from the time plaintiff's counsel received notice and the day of hearing. Loza v. Osmola, 279 Mass. 220, 222-223 (1932).

7. And even if the Court is in error in ruling that the notice was sufficient and in accordance with the Rules it is clear from paragraph 6 of the Stipulation of Facts that if a new Motion were to be brought by the defendant and the Court were to enter the same order (which I would do) the plaintiff would still refuse to answer.

8. Accordingly, it is now appropriate to rule on the instant motions heard on September 21, 1983.

9. Exhibit A (transcript of deposition of Joseph F. Wansong taken on June 13, 1983) at the hearing on September 21, 1983 is incorporated in and made part of this Memorandum (pp 15 through end in particular).

10. The information sought by the defendant from the plaintiff as the taking of the deposition is relevant to the factors of conduct, estate, liabilities and needs of the parties as set forth in G.L.c. 208, s. 34.

11. In addition, if the question of visitation rights is present (plaintiff does not seek custody) the issue of any possible illegal sexual conduct on the part of the plaintiff and its possible negative effects on the child exists.

12. A party's relationship with a third party member of the opposite sex raises questions of whether or not gifts from capital or a portion of

current income or both have been made, are being made, or will be made, all to the detriment of the other spouse.

13. The questions propounded to the plaintiff by the defendant were proper and could be asked at the trial on the merits.
Pulawski vs. Pulawski, Slip Opinion, R.I. Sup.Ct. July 15, 1983, p.5., 463 A.2d 151.

14. In paragraph 6 of his Complaint the plaintiff requests the Court to "Order Suitable Support for the said minor children" and further to order a division of the property of the parties G.L.c. 208, s.34." Thus the plaintiff has requested the Court to apply the provisions of G.L.c. 208, s34 and thereby submitted his economic situation for consideration. The questions put to the plaintiff

by defendant's counsel were designed to ascertain economic information as well as information relating to plaintiff's conduct.

15. The plaintiff has refused to answer (and would refuse to answer in the future) (Stipulation of Facts, paragraph 9, pp 3,4) questions which are material to the equitable application of G.L.c. 208, s.34 by the Court. It is elementary law that the Court in applying G.L.c. 208, s.34 must consider the factors set forth in that statute.

16. The plaintiff's refusal to answer is based upon his claim to the right not to incriminate himself pursuant to the Fifth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of Massachusetts.

17. Insofar as the questions put to the plaintiff at the deposition related

to his conduct with a third party one might argue that he had little basis for his refusal. In Fort v. Fort, Mass. App.Ct. Adv. Sh. (1981) 1594, 1599, the Court took notice of the fact "that the crimes of fornication, adultery, and lewd and lascivious cohatitation are never, or substantially never made the subject of prosecution..." But the Supreme Judicial Court in Commonwelath v. Stowell, 389 Mass. 171 (1983) sustained a conviction for adultery holding that the statute (G.L.c. 272, s14) was constitutional. On the basis of Stowell I rule that plaintiff has a right to protect himself against self-incrimination with respect to his conduct involving a third party female.

18. This plaintiff as a party to a civil action had the right to claim the privilege against self-incrimination. But a witness who voluntarily takes the

stand in a civil action has been held to waive the privilege against self-incrimination in respect to cross examination that is relevant to the issues raised by such testimony. Brown v. United States, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958).

19. The question then, is does the plaintiff have the right to affirmatively seek relief from this Court (equitable division of marital property and a judgment of divorce nisi) and at the same time refuse to answer questions relating to material issues involved in the application of G.L.c. 208, S.34? And what if the Court decides that an order for alimony should be made?

20. The plaintiff submits that his right to refuse to incriminate himself is justified by the holdings of the

Supreme Court in Spevack v. Klein, 385 U.S. 511, 87 S. (t. 625, 17 L. Ed. 2d 574 (1967) and Garrity v. New Jersey, 385 U.S. 493, 87 S. (T. 616, 17 L.E.d. 2d 562 (1967).

21. The answer to this contention was stated by Justice Weisberger in Pulawski v. Pulawski, Slip Opinion, July 15, 1983, 463, A.2d 151, on pages 7 and 8 as follows:

> The Wife argues that no sanctions should be imposed upon her or inferences drawn against her as a result of her assertion of her privilege against self-incrimination and cites in support of this proposition, Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), and Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). She might also have cited Gardner v. Broderick 392 U.S. 273, 88 S. Ct. 1913, 20 L.

Ed. 2d 1082 (1968). All of the foregoing cases related to the imposition of direct sanctions upon a party for asserting his privilege against self-incrimination. In Spevack, a lawyer was disbarred as a result of his refusing on self-incrimination grounds to answer questions relating to professional misconduct. In Garrity a police officer was threatened with discharge if he refused to answer questions concerning ticket fixing. In coerced answers to these questions were held to be inadmissible in a criminal case. In Gardner it was held that a provision of the New York City charter which was required discharge of a police officer who refused to answer questions concerning bribery and corruption on grounds of self-incrimination was constitutionally infirm. All of the foregoing cases related to litigation

between a governmental agency and a private party.

In Mahne v. Mahne, 66 N.J. 53, 328 A.2d 225 (1974), the Supreme Court of New Jersey considered a similar problem arising out of the refusal of a wife to answer questions concerning her alleged adulterous conduct. The court distinguished such a situation from those in Gardner, Garrity, and Spevack, observing that these cases did not arise in the context of private litigation between parties in which noncriminal sanctions are sought to be imposed in aid of orderly pretrial discovery or in respect to testimony in a civil action. A number of cases have held that a plaintiff in a civil action who refuses to testify even in pretrial discovery on grounds of self-incrimination may be subject to the dismissal

of his action or to some lesser non-criminal sanction. See Christenson v. Christenson, 281 Minn. 507, 162 H.W. 2d. 194 (1968); Franklin v. Franklin,365 Mo. 442, 283 S.W. 2d 483 (1955); Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S. 2d 574 (Sup. Ct. 1958), aff'd 7 A.D.2d 995, 183 N.Y.S. 2d 868, aff's 6 N.Y.2d 892, 160N.E.2d 921, 190 N.Y.S. 2d 702 (1959).

22. The situation of one party refusing to testify or offer evidence which is relevant to one or more of the criteria set forth in Section 34 based upon the claim of privilege against self-incrimination was presented to the Supreme Judicial Court in Borman v. Borman, 378 Mass. 775 (1979). In Borman, the Wife filed for divorce and asked for an award of alimony and distribution of marital assets. During her deposition

she refused to answer questions relating to her having had an extramarital affair. The trial court gave the Wife the choice of answering such questions or having her request for alimony and distribution of assets striken. At this point in the proceedings, the Wife appealed the lower court's order. The appeal was dismissed without reaching the merits of the case on the grounds that the Wife's appeal was premature, the order appealed from was merely interlocutory (the case having been heard prior to the amendment to M.G.L., c. 231, S118 allowing appeals on such interlocutory orders).

23. In Christenson v. Christenson, 281 Minn. 507, 162 N.W. 2d 194 (1968) the Supreme Court of Minnesota sustained the action of the trial court in dismissal of a divorce action when

the plaintiff Wife refused to waive her privilege against self-incrimination. At page 524 the Court said,

> "while plaintiff cannot be compelled to waive her privilege against self-incrimination in this divorce action, as in any other civil action, she must either waive it or have her action dismissed."

24. The same principle prevails in Florida. The Supreme Court of Florida in Stockham v. Stockham, 168 So. 2d 320 (1964) and Minor v. Minor, 240 So. 2d 301 (1970) has sustained dismissals of divorce actions when a party has claimed the Fifth Amendment.

25. In Nuckols v. Nuckols, 189 S. 2d 833 (1969), a decision of a Florida Appeals Court, a husband's cross claim for divorce was dismissed because of

his alleged adultery. In that case, the Court held that:

> "(w)hen her husband filed his counterclaim seeking independent relief beneficial to him, he became an actor, a profiteer of the judicial machinery and process, so as to bring him within the doctrine of Stockhame...That doctrine is to the effect that, while, one may in civil litigation, exercise his privilege against self-incrimination, if he chooses to do so, the court's doors will be shut to him as concerns his right to obtain relief or remedy based on his claim or action."

26. An additional reason for barring a party from testifying at trial who refused to testify during discovery was given by the Nevada Supreme Court in Meyer v. The Second Judicial

District Court, 591 P. 2d 259 (1979):

"While the petitioner may have a constitutional right to claim the privilege, she has no constitutional privilege to choose the time at which such privilege may be waived, to the prejudice of the opposing party and in derogation of the discovery policies of the Nevada Rules of Civil Procedure." Id. at 263.

27. In Pro v. Pro, 300 So. 2d 288 (1974) an Appeals Court of Florida held that where a wife charged her husband during a divorce proceeding with adultery and the husband refused at his deposition to answer all questions relating to such charges, sanctions against the husband should be imposed. The Court stated:

"We believe the wife's inquiry was reasonably calculated to lead to admissable evidence, and it was

error not to require the husband either to answer the questions as framed or suffer sanctions." Id. at 289.

28. In Roberts v. Jardin, 358 So. 2d 588, a Florida Appeals Court indicated that striking the testimony of a defendant who refused to answer interrogatories on the basis that the answers may tend to incriminate her would be an appropriate sanction.

29. The Supreme Court of New Jersey has also held that a defendant who refuses to testify at a deposition or answer interrogatories based upon claims of privileges may be barred from testifying during the trial. Mahne v. Mahne, 328 A. 2d 225 (1974) and Costanza v. Costanza, 328 A. 2d 230 (1974).

30. The Supreme Court of the state of Washington gives the following explanation of why the testimony of a party may be striken when that party refuses to answer pertinent questions:

"A witness who declines to answer a proper question upon the ground that it would tend to incriminate him, has not told the whole truth, which his oath as a witness requires. He will not be permitted to testify to part of the truth only. When a party claims the privilege of not answering a proper question, the Court may dismiss his action or strike his testimony."

Annest v. Annest, 298 P. 2d 483 at 484.

28. More recently the Rhode Island Supreme Court in Pulawski v. Pulawski, Slip Opinion July 15, 1983, 463 A.2d 151, allowed sanctions to be imposed upon

a wife who refused to answer questions concerning her alleged adulterous conduct, particularly because she was seeking financial relief from her husband in the form of alimony and equitable distribution of property. The court, in particular, stated:

> "We are of the opinion that the imposition of sanctions in a civil action by one who refuses to answer questions relating to the subject matter in issue on the ground of self-incrimination is not a violator of any right guaranteed by the Fifth Amendment to the Constitution of the United States or Article I Section 13 of the Rhode Island Constitution."

29. In this case the defendant seeks to prevent the plaintiff or his witnesses from testifying at the trial on financial issues, issues relating to custody and visitation of and with the child, and such other issues to which

the Husband previously invoked his privilege against testifying to. In addition to this Court's power under Mass. R. Com. Rel. p. 37 to strike pleadings, the party can be prohibited from supporting or opposing designated claims or defenses and introducing evidence relating to such claims or defenses; or certain matters may be regarded as established. Although the Husband cannot be compelled to answer questions about his suggested adulterous relationship, his decision to refuse to answer these questions during discovery should still subject him to the sanctions enumerated in Rule 37. Any other result places the civil litigant, whose case is based in part in the criminal misconduct of the other party in the posititon of being denied any effective discovery about the basis of his claim, while the other litigant

protects himself from civil liability using privileges designed only to protect him from criminal conviction. State courts have been willing to bar testimony of a party who invoked the Fifth Amendment during discovery or strike all testimony of a party/witness if the privilege was invoked at trial.

30. When a party to a divorce refuses to testify regarding a suggested adulterous relationship on the basis that adultery constitutes a crime in this Commonwealth and his or her testimony may tend to be incriminating, the other party, and hence the trial court, is denied information regarding at least one of the criteria of Section 34 - conduct of the parties. The Court cannot make all of the specific findings required by Section 34 as it is required to do.

Additionally, investigation of other criteria is often hindered by a party's invocation of the privilege against self-incrimination. This occurs when a party not only refuses to answer whether he/she has engaged in sexual intercourse with a third party, but also refuses to answer whether there have been substantial gifts of assets to or from this third party; joint ownership of assets; or a contribution towards support. When a party refuses to testify on these financial issues, the trial court is denied information relating to the income, assets, liabilities, opportunities for future acquisition of assets and income, and needs of the party who invokes the privilege.

31. In the present case allowing the Husband or his witnesses to present testimony at trial will prejudice the Wife in two important ways. First, the Husband will

be allowed to shape the testimony which further introduced into evidence by answering only those questions which might damage his defense. Secondly, by allowing the Husband to testify at trial, he is being placed in the position of being able to waive the privilege for the first time at trial and surprising the Wife with new information not made available to the Wife during the pre-trial discovery period.

32. Mass. R. Dom. Rel. P. 30 (a) allows a party to take a deposition of the other party. Mass. R. Dom. Rel. P. 37 provides for sanctions to be imposed upon a party who has been ordered to answer and fails to do so. Rule 37 (b) (2), (c) provides that the court may enter:

"An order striking out pleadings part thereof...or dismissing the

action or proceeding or any part thereof..."

34. Further Rule 37 (b) (2) (A) provides that the Court may enter"

"An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."

35. In Imprescia v. Imprescia, 16 Mass. App. Ct. 378 (1983) (F/A/R granted September 30, 1983) the Court held that Mass. R. Dom. Rel. P. 37 (b) (2) (c) did not allow entry of a default as a sanction for failure to comply with discovery. However, this Rule does allow a Court to dismiss an action as a sanction.

36. The prejudice to defendant in defending in the instant action and in prosecuting her cross action for divorce (71101) as a result of

plaintiff's refusal to answer warrants the imposition of sanctions as provided for in Rule 37. The sanction of dismissal of plaintiff's action is available. Stockham v. Stockham, 168 So. 2d 320 Florida Supreme Court (1968).

37. Wherefore, for the reasons stated above, I rule as follows on the following Motions:

a) Defendant's Motion to Dismiss Complaint For Divorce (pleading 30)

"After hearing the within motion is hereby allowed".

b) Defendant's Motion To Prohibit Joseph F. Wansong's Introduction Of Evidence At Trial (pleading 31)

"After hearing the within motion is allowed as to prayer 1 (page 4)

only and as to prayer 2, denied."

c) Defendant's Motion To Strike Financial Statement And Testimony Of Joseph F. Wansong (pleading 32)

"After hearing the within motion is allowed as against Joseph F. Wansong, individually, and not against any witnesses he may offer."

d) Plaintiff, Joseph F. Wansong, Motion For Protective Order (pleading 29)

"After hearing the within motion is denied."

By the Court

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Haskell C. Freedman,
Justice, Probate
and Family Court
Department, Essex
Division

Dated: October 17, 1983

APPENDIX C

1C

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON June 11, 1985

In the Case No. SJC-3727

JOSEPH F. WONSONG

VS.

ELIZABETH A. WONSONG

Pending in the Probate and Family Court Department of the Trial Court for the County of Essex, No. 70727, 71101

ordered, that the following entry be made in the docket: viz.,-

The judge properly entered the interlocutory orders presently before the court on reservation and report. We remand the action to the Probate and Family Court for further proceedings consistent with the opinion.

By The Court,

S/Frederick J. Quinlan
Assistant Clerk

June 11, 1985

See opinion on file.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT (V.)

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compentsation.

Pt. 1, Art. 12 CONSTITUTION OF MASSACHUSETTS

Art. XII. No subject shall be held to

answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

APPENDIX E

General Laws of the Commonwealth of Massachusetts, Chapter 208, Section 45.

If a divorce is granted for a cause constituting a crime, committed within the commonwealth and within the time provided by law for making complaints and finding indictments therefor, the court granting the divorce may, it its discretion, cause notice of such facts to be given by the clerk of the court or register of probate to the district attorney for the district where such crime was committed, with a list of the witnesses proving such crime and any other information which it considers proper and thereupon the district attorney may cause complaint therefor to be made before a magistrate having jurisdiction thereof, or may present the evidence thereof to the grand jury.